Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

WALTER JITNER

Petitioner

v.

COMMERCIAL FINANCIAL/SPC ACQUISITIONS, INC.

and

FINANCIAL COLLECTIONS, INC.

On Petition for Writ of Certiorari
To The U.S. Ninth Circuit Court of Appeals #98-56810

PETITION FOR WRIT OF CERTIORARI

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CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

I. QUESTIONS PRESENTED FOR REVIEW

1. This court in O'Melveny & Myers v. FDIC (1994) 512 US 79 reversed a ruling by the Ninth Circuit Court of Appeals and ruled that in a matter involving the FDIC and in the absence of a applicable federal statutory provision, there can be no federal common law. The courts must then apply state law. Under these circumstances may the Ninth Circuit Court of Appeals, subsequent to the O'Melveny ruling, ignore the relevant state law when rendering a decision involving the FDIC when this is no applicable federal statutory provision?

2. Under the circumstances described above in Question 1 and subsequent to the O'Melveny ruling, may the Ninth Circuit Court of Appeals create their own common law rule in rendering a decision regarding a FDIC matter when there is no applicable federal statutory provision?

3. California Commercial Code § 3203 ("§ 3203") provides that when there is no indorsement by the payee on the face of a note the possessor acquires no rights in the note unless the possessor provides proof of the transaction by which it acquired the note. Under the circumstances described above in Question 1 and subsequent to the O'Melveny ruling, may the Ninth Circuit Court of Appeals disregard § 3203 and create a Federal Common Law which allows the possessor to collect on a note when there has been no indorsement by the payee and the possessor failed to provide competent proof of the transaction by which the note was obtained?

II. LIST OF ALL PARTIES

Walter Jitner - Defendant and Petitioner
Commercial Financial/SPC Acquisitions, Inc.
and
Financial Collections, Inc.
(both Oklahoma Corporations)
Plaintiffs and Respondents

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V. CITATION TO OPINION BELOW

U.S. Ninth Circuit Court of Appeals # 98-56810

VI. STATEMENT OF JURISDICTIONAL GROUNDS

A. U.S. Ninth Circuit Court of Appeal # 98-56810

(1) Judgment of Appeal dated 5-3-01.

(2) Judgment on Rehearing dated 12-10-01

B. The statutory provision conferencing jurisdiction to review judgment is:

Supreme Court Rule 10 & Rule 10(a)

C. Notification under Rule 29.4(b) is not required

VII. RELEVANT CONSTITUTORY, STATUTORY & RELATED PROVISIONS

A. California Statute

California Commercial Code § 3203 and Official Comment 2 thereto.

(a copy is enclosed as document 5 in the Appendix - Section XI)

B. Maine Statute

11 MRSA § 3-1203 and UCC Comment 2 thereto

(a copy is enclosed as document 4 in the Appendix - Section XI)

VIII. STATEMENT OF THE CASE

This case was initiated by Commercial Financial/SPC Acquisitions Inc. ("COMMERCIAL") based, in part, on a $50,000.00 California promissory note ("1st Note") of which the original payee (or obliqee) was Independence Bank ("INDEPENDENCE"). Defendant and Petitioner herein, Walter Jitner ("JITNER"), as an accommodation borrower, appears on the face of the note as a one of the payors (or obligors).[1] This 1st Note, shows on its face an indorsement by the Federal Deposit Insurance Corporation ("FDIC"), in its corporate capacity, to COMMERCIAL. However, the note does not show an indorsement to the FDIC by the original payee on the face of the note, INDEPENDENCE.

Eventually a second plaintiff, Financial Collections Inc. ("FINANCIAL"), was added to the lawsuit. FINANCIAL sued on a $100,000.00 California promissory note ("2nd Note") on whose face the only payee (or obligee) was the Bank of Beverly Hills ("BEVERLY"). JITNER, as an accommodation borrower, appears on the 2nd Note as one of the payors (or obligors).[2] Like the 1st Note, this 2nd Note shows, on its face a FDIC indorsement, in this case to FINANCIAL. But, there is no indorsement by

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1. Peter Fullerton ("FULLERTON"), the person to whom the borrowed funds were paid, is the only other payor on this note.

2. Like the 1st Note the borrowed funds were paid to FULLERTON who is the only other payor appearing on the face of the note.

BEVERLY (original payee under the note) to the FDIC. The state of the record is summarized in chart form as follows:

	1st NOTE	2nd NOTE
1. Face amount of Note	$50,000	$100,000
2. Original Obligee	INDEPENDENCE	BEVERLY
3. Obligor	FULLERTON/borrower JITNER/Accommodation Borrower	FULLERTON/ borrower JITNER/ Accommodation Borrower
4. Evidence that FDIC is successor-in-interest to original obligee	No competent evidence the FDIC, in its corporate capacity, is successor to original obligee	No competent evidence the FDIC was appointed BEVERLY's receiver or is BEVERLY's successor
5. FDIC endorsement	From FDIC in its corporate capacity to COMMERCIAL	From FDIC as BEVERLY's receiver to FINANCIAL.

Plaintiffs, as Oklahoma Corporations, sued a California residents, JITNER and FULLERTON, in Federal district court based upon diversity of jurisdiction.

Row 4 of the chart pinpoints the juncture at which JITNER claims error and which is the basis of

this petition.[3]

As developed below, the Ninth Circuit Court of Appeals ("9th Circ.") fashioned a federal common law rule which dispensed with the state law requirement of Cal Com'l Code § 3203 that the FDIC (and those claiming under it) could have rights under the notes only if there is proof of the transaction through which the FDIC acquired the notes. In place of the relevant state law the 9th Circ. fashioned a federal rule of the case that all that was required to recover under the notes was the FDIC's indorsement and JITNER'S concession that he was a payor on the notes. JITNER stands on the following proposition which he urged at both the trial and appellate level: under this Court's holding in O'Melveny & Myers v. FDIC 512 US 79, 114 S. Ct 2048, 129 E. Ed 67 (1994) the federal courts are not free to ignore the relevant state law and in its place fashion a federal rule of decision governing the FDIC's rights in the notes. (512 US 79)

A more familiar and analogues situation illustrates the analysis developed in this petition. (A is JITNER B is INDEPENDENCE and BEVERLY C is the FDIC D is the FDIC Assignees).

- A writes a check on his account to B. C obtains possession if the check without an indorsement from B

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3. The record will show the FDIC issued a disclaimer when it assigned the notes which indicated that it gave no warranties and that the notes might not be collectable.

to C. C then assigns and indorses the check to D. The essence of the problem is that there is no indorsement from B to C.

Under state law D must prove the transaction through which C acquired the check since there was no indorsement from B to C. Cal Com'l Code § 3203.

The 9th Circ. instead of following the relevant California law fashioned its own Federal Common Law rule that if C was the FDIC, D would not have to prove the transaction through which C acquired the note.

This 9th Circ. ruling is in direct conflict with: (1) This Court's ruling in O'Melveny & Myers v. FDIC (1994) 512 US 79 (which reversed a 9th Circ. ruling). (2) FDIC v Houde (1st Circ. 1996) 90 F_3d 600; and, (3) California Commercial Code § 3203.

Both plaintiffs brought and prevailed on summary judgment motions. Both plaintiffs had the same servicing agent for their promissory notes, Commercial Financial Services, Inc. ("SERVICES"). The only evidence proffered in support of their summary judgment motions was declarations by SERVICES employees (hereafter "DECLARATIONS") who declared that they were familiar with the records of the FDICs assignees (COMMERCIAL and FINANCIAL) and that "those records reflect the facts set forth below". What followed was the declarants' conclusions as to what facts would be reflected by the records, including their conclusion that the records would reflect that the FDIC obtained the notes as receiver of the original

payees.[4] The only documents attached to the DECLARATIONS were copies of the notes and the copies of loan documents. None of the DECLARATIONS had attached to them the one document which would reflect the appointment of the FDIC as INDEPENDENCE's and BEVERLY's receiver -- which would prove the transaction through which the FDIC acquired the notes.[5]

JITNER repeatedly objected to the trial court's

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4. A review of the record will show that when plaintiffs filed declarations in connection with various motions the declarants would testify as to their conclusion of what the records reflected. Occasionally those records were attached and they directly contradicted the declarants' conclusions. (Opening Brief Page 14-15 & Fn 7)

5. JITNER inquired of the FDIC what document would prove and reflect the fact that the FDIC acquired promissory notes as the receiver of an insolvent bank. In compliance with Fed Rules of Evid 201, 28 USAC (Evid R 201") he then described the document to the trial court and requested that the court take judicial notice of the required document. Consistant with Evid R 201 JITNER provided the court with the name of the FDIC employee in Washington D.C. who could confirm the information and indicated how the court could easily reach that employee. The court never responded to JITNER's request nor will the record show such a document was ever produced before the court. Yet, summary judgment was granted and affirmed.

consideration of the DECLARATIONS on several grounds: the DECLARATIONS were conclusionary; the DECLARATIONS, without the attached documents, violated the best evidence rule; testimony as to what the documents might reflect violates the hearsay rule; declarants were not percipient witnesses to the substance of their testimony; and, the DECLARATIONS were in violation of Fed Rules Civ. Proc. 56(e), 28 USCA . ("Civ.R.56(e)") in several respects.[6] The trial court, Judge Mariana Pfaelzer presiding, refused to rule on JITNER's objections and relied on the DECLARATIONS when issuing the summary judgment.

At the trial level JITNER relied on this Court's holding in the O'Melveny case, supra, 512 US 79, that if the Federal statutory scheme creating and regulating the FDIC (12 USAC § § 1811-1840) does not directly address a question, then the federal courts must

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6. The Civ R 56(e) rule violations claimed by JITNER to a great extent mirrored his evidentiary objections, such as; (1) the declarations were not based on personal knowledge setting forth facts as would be admissible in evidence, (2) the declarations did not affirmatively show affiant's competency to testify on the matter stated in the affidavits and (3) there were no sworn or certified copies of papers attached to the declarations to which the declarations referred and upon which they relied. The 9th Circ.'s opinion isolated only on the third claimed Rule 56 violation and ignores JITNER's other evidentiary objections. (see nt 7 and accompanying text)

resolve the question by applying relevant state law; they are not free to ignore state law and fashion their own Federal rule of decision to answer the question. He asserted that under California law if (1) a transferee (The FDIC) is in possession of notes which on their face do not show it (The FDIC) as a payee and (2) there is no indorsement on the face of the notes from the payees (INDEPENDENCE AND BEVERLY), then the transferee (the FDIC) does not obtain any rights under the notes unless it is able to prove the transaction through which it acquired the notes (Cal Com'l Code § 3203 and Official Comment (2) thereto) Possession of the note by the FDIC is not sufficient! JITNER pointed out there is no Federal statute cited which addresses whether possession alone of the notes by FDIC, without more, is sufficient for the FDIC to acquire rights under the notes. Thus, under California law before the FDIC (and the assignee who claiming under the FDIC) can obtain rights under the note, there must be proof of the transaction through which the FDIC acquired the notes -- proof that it acquired the notes as receiver of the original payees. JITNER then asserted that because the only evidence proffered in support of the facts necessary for recovery was incompetent evidence to which he had objected, the plaintiffs failed to prove they acquired any rights under the notes. Finally, JITNER pointed the trial court to FDIC v Houde 90 F.3d 600 (1st Cir. 1996) whose facts were remarkable similar to the facts herein.

In Houde the FDIC was seeking to recover on a note in which a bank was the payee and where there was no indorsement to the FDIC. The court held that: (1) under state law the FDIC could recover on the note

only if it met the requirement of proving the transaction through which it acquired the note (2) proof that it was appointed receiver of the bank (payee) would meet this requirement and (3) the proffered testimony of the FDIC's custodian of the records that the records would reflect such appointment was not competent evidence to establish the receivership. The FDIC was, therefore, precluded from recovery under the note.

The trial court herein apparently applied state law to the extent that proof of FDIC's receivership was necessary for recovery. It then found that the FDIC was INDEPENDENCE's and BEVERLY's receiver. It did so (1) inspite of JITNER's objection to consideration of the DECLARATIONS and did so without ruling on his objections and (2) in spite of the holding in the Houde Case and (3) inspite of the fact that the document which would reflect and prove the FDIC's receivership was not before the court (see nt 5 on page 5).

JITNER then appealed to the 9th Circ. In his briefs he: (1) repeated the state requirements of Cal Com'l Code § 3203 and Official Comment 2 thereto; (2) brought to the 9th Circ.'s attention this Court's teaching that the Federal court was not free to fashion a common law principal in derogation of state law and (3) repeated his evidentiary and Civ R 56(e) violation objections upon which the trial court refused to rule.

The 9th Circ. saw no need to deal with JITNER's objections to the consideration of the DECLARATIONS. They referred particularly to JITNER's Rule 56(e)

objections that the DECLARATIONS did not have attached to them certified copies of the documents referred to and relied upon by the declarants, which of course would include the document which would prove and reflect the FDIC's appointment as receiver (see footnote 5 at page 5). It saw no need because it fashioned its own federal rule of the case which dispensed with the state requirement that in order for the FDIC (and those assignees claiming under it) to have rights under the notes there had to be proof of the transaction through which the FDIC acquired the notes. The 9th Circ.'s opinion states at page 20.

"1. Defendant first argues that, under ... [Civ Rule 56(e)], Plaintiffs were required to attach to their affidavits in support of summary judgment all the documents on which they relied. Plaintiffs submitted sufficient documentation to establish their rights to recover on the notes: (a) A copy of the $100,000 note, attached to the McLaughlin affidavit, shows an endorsement to... [Financial] from the FDIC. (b) A copy of the $50,000 note, attached to the Robertson affidavit, shows an endorsement from the FDIC to [Commercial]. Those documents, in conjunction with Defendant's in-court concession that he owes the money, demonstrate Plaintiffs' rights to enforce the notes (emphasis added)."7

Even though the requirements of Cal Com'l Code § 3203 were brought to the 9th Circ's attention, it decided to ignore § 3203 and created its own Federal

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7 See footnote 6 on page 6

court rule which dispensed with the requirement that there be proof of the transaction through which the FDIC acquired the notes. It formulated its own Federal common law rule in direct conflict with this Court's teaching in O'Melveny & Myers case and did so after JITNER brought that teaching to the 9th Circ.'s attention. Not only did the 9th Circ. not follow the O'Melveny & Myers case, it saw no need even to discuss it, inspite of its relevance. It also completely ignored the Houde case upon which JITNER relied. It is this conduct by the 9th Circ. which gives rise to this petition.

IX. STATEMENT OF CASE - REVIEW OF FEDERAL COURT JURISDICTION SOUGHT

The plaintiffs (Respondents) were incorporated under the laws of the State of Oklahoma and their principal places of business is in Oklahoma.

The defendant (Petitioner) is a citizen of the State California.

At the time of filing the matters in controversy, exclusive of interests and costs, exceeded the sum then specified by 28 USC § 1332.

X. ARGUMENT

A. Under This Court's Rule 10 Certiorari Should Be Granted Because the Ninth Circuit Court of Appeal's Opinion Ignores and Directly Conflicts with This Court's Holding in O'Melveny & Myers v FDIC, a Case in Which This Court Reversed a Ninth Circuit Opinion.

Prior to the O'Melveny & Myers case the federal courts constructed a Federal common law surrounding FDIC involved transactions. Federal courts filled in the silences in the Federal statutory scheme with federal rules of decision in derogation of applicable state law. This Court in reversing the 9th Circ. in O'Melveny & Myers reasserted the Erie Doctrine and swept away this federal common law accretion. This Court stated in O'Melveny & Myers v. FDIC 512 US 79, 85, 1145. Ct 2048, 1129 L. Ed 67 (1994) that:

> In answering the central question of displacement of California law, we... would not contradict an explicate federal statutory provision. Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to disposition provided by state law. (emphasis added)

This Court recognized that in rare cases when there is an identifiable and specific concrete federal policy or interest that is compromised by state law,

then a federal rule of decision may be justified. However this Court found no such policy or interest regarding the particular right of the FDIC as a receiver[8] 512 US at 88-89.

JITNER in both courts below briefed this Court's O'Melveny & Myers teaching which expressly required the federal courts to apply California law as to what the FDIC (and those claiming under it) must do to be able to assert rights under the notes.[9]

The 9th Circ. essentially turned a blind eye to this Court's O'Melveny & Myers teaching and the relevant California law which dictates what rights the FDIC acquires in the notes and passes on to its assignee.[10] It was on this basis the 9th Circ. justified its not addressing JITNER's evidentiary and Rule 56(e) violation objections to the DECLARATIONS.

This Court should not tolerate the 9th Circ.'s selective adherence to Supreme Court holdings. This

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8 This court rejected (1) "uniformity of federal law facilitation and (2) "federal rule of decision might prevent depletion of the insurance fund" both inadequate as such a policy or interest 512 US at 88-89.

9 See page 5 of this petition in which the requirements of California law are set forth. See also Section XI - Appendix - Document 5.

10 The 9th Circ. also ignored the FDIC disclaimer set forth in footnote 3 at page 2.

Court must not allow a lower court to apply the O'Melveney & Myer holding if its result comports with a predetermined outcome and to deliberately ignore it when it does not so compost.[11]

B. Under This Courts Rule 10 Certiorari Should Be Granted to Create Uniformity in All The Circuits

JITNER below briefed the 1st Circuit case FDIC v Houde 90F3d 600 (1st Cir. 1996), a case whose facts are remarkably similar to the instant case but whose outcome was just the opposite.

In Houde, as in the instant case, the FDIC was in possession of a note where the payee on the face of the note was a bank. As in the instant case there was no indorsement from the payee to the FDIC. Unlike the 9th Circ. the 1st Circuit applied the state law which was identical to California law.[12] It recognized that under 12 U.S.C. § 1821 (d) (2) the FDIC as receiver could

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11 A review of the record will reveal that the trial court prejudged the case at the first status conference when it ordered the plaintiff to seek summary judgment (Opening Brief, p.3 at nt. 1) and, it will reveal repeated instances of the courts below ignoring evidence before them, even to the point of having, as a result, to vacate rulings (for example see Opening Brief pages 12-14).

12 The Maine Code provision cited by Houde appear first follow by a slash and the comparable California provisions: 11 M.R.J.A. § 3-12/Cal Com'l Code § 3203; 11 M.R.S.A. § 3-1203 and UCC comment thereto/Cal Comm Code § 3202 and Official comment 2 thereto.

assert rights under the note. The question was whether the FDIC could prove its receivership; only then would the FDIC be in compliance with state law which required proof of the transaction through which the FDIC acquired the note. Only then would the FDIC have enforceable rights under the note! In the instant case the trial court, unlike the 9th Circ., apparently, like Houde found it necessary that there be a factual determination that the FDIC was the receiver. It made such finding and did so on the basis of the DECLARATIONS. The trial Court's reliance on the DECLARATIONS was in direct conflict with the Houde decision.

In Houde the only proffered testimony in support of the proposition that the FDIC came into possession of the notes as receiver was testimony by the FDIC's custodian of the records, one GOLDEN. He testified that the FDIC records would reflect that the FDIC obtained the note as a receiver. In the instant case the trial court relied on the testimony of employees of SERVICES (a servicing company) to testify as to what COMMERCIAL's and FINANCIAL's records would reflect, including that the FDIC was receiver of INDEPENDENCE and BEVERLY.

In Houde the court found that the testimony of the FDIC's Custodian of Records was not competent evidence to establish that the FDIC was the receiver. If the custodian if the actual records of the FDIC could not provide competent testimony, then certainly the testimony of employees of a servicing company for the FDIC's assignees could not provide competent testimony that the FDIC was the receiver.

In Houde, based on evidentiary objections to the GOLDEN testimony, his testimony was struck. Here in the trial court repeatedly ignored JITNER's objections to consideration of the DECLARATIONS by made by SERVICES' employees to the effect that the FDIC's assignees records would reflect that the FDIC was appointed receiver of the banks. Thus, in Houde the FDIC could not recover under the notes because it could not prove the transaction through which it acquired the note -- it could not prove its receivership because of incompetent testimony. In the instant case the FDIC's assignees were allowed to recover based on the trial court's refusal to even consider some of the same evidentiary objections that proved fatal to the FDIC's rights (and consequently to any of its assignees) in the Houde case.

The 9th Circ. ignored JITNER's claim of error based on the trial court's refusal to consider his evidentiary objections. It did so because it set out its own federal rule of decision which ignored this Court's O'Melveny & Myers teaching and the requirement of California law. Its own Federal common law rule dispensed with the need to prove the transaction through which the FDIC acquired the notes. Thus JITNER's evidentiary objections to the lower courts consideration of the DECLARATIONS as competent evidence of the FDIC receivership were rendered irrelevant. This is so because of the 9th Circ's common law rule of the case dispensed with the need to prove the FDIC receivership as mandated by California law.

By accepting certiorari not only can this Court insure that the 9th Circ. does not turned a blind eye to

the Supreme Court's holding in O'Melveny & Myers, but it can insure uniformity among the circuits for fact patterns similar to those herein and in Houde. This Court can make it clear that when the FDIC claims rights under a note as a receiver it must conform to the provisions of the UCC, as adapted by the individual states. If a state adopts the UCC requirement that, absent an indorsement on a note, the transferees under the note only obtain rights under the note if there is proof of the transaction through which it acquired the note, then for the FDIC (and its assignees) to acquire rights under the note that they must comply with this states mandated requirement.

CONCLUSION

This Court in O'Melveny & Myers reversed a 9th Circuit case and announced the legal principal that courts were not free to formulate federal common law regarding the FDIC; any questions unaddressed by the federal statutory scheme must be resolved by the application of state law. In the instant case, that very circuit, the 9th Circuit, chose to deliberately ignore this Court's O'Melveny & Myers teaching. "Deliberately" because this court's ruling was briefed for the 9th Circuit[13]. "Ignored" because the 9th Circuit not only held in direct contradiction with O'Melveny & Myers but it did not even bother to mention the case.

There was no competent evidence before the court that the FDIC acquired the notes as receiver of the original payees. Indeed, the absence of the one

[13] While O'Melveny & Myers appears in all of JITNER'S briefs, its relationship to the 9th circuit's opinion is most clearly set forth in his Petition for Rehearing.

document necessary to prove such receivership[14] may well account for the notes to plaintiffs was accompanied by a disclaimer of any warranties and a disclaimer as to collectability of the notes[15] . When the 9th Circuit dispensed with the requirement of Cal. Comm. Code § 3203 (and Official Comment 2 thereto) in favor of its own federal rule (namely, that there was no need to prove the transaction through which the FDIC acquired the note) it denied this Court's O'Melveny & Myers holding. This Court must grant this Writ to make it clear that all questions unaddressed by the Federal statutory scheme (12 USAC §§ 1811-1840) must be resolved by the application of state law; the courts are not free to formulate their own federal common law in direct violation of the O'Melveny & Myers holding.

The First Circuit's holding in the Houde case comports with the O'Melveny Myers holding without even mentioning the case. It applied state law and denied recovery to the FDIC because the FDIC could not prove (as required by state law the transaction through which it (the FDIC) acquired the note. The 9th Circuit holding is in direct contradiction with Houde.

It is imperative that this Court accept this Petition to prevent the 9th Circuit from deliberately acting contrary to a U.S. Supreme Court ruling and to bring uniformity among the circuits. Thus, Petitioner, JITNER, respectfully requests that the court accept this

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[14] See footnote 5.

[15] See footnote 3. The text of the disclaimers and where they appear in the record are set out in the Opening Brief, page 30, and the Reply Brief at page 4.

Petition for Certiorari and that it remand the matter to the 9th Circuit with instructions that it apply California law (particularly Cal. Comm. Code § 3203 and that it examine the record to determine if there was proof at the trial level of the transaction through which this FDIC acquired the notes.

Respectfully submitted,

WALTER JITNER

Petitioner in Pro Se

XI. APPENDIX

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Filed May 3, 2001

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CF/SPC 1994, INC.; COMMERCIAL FINANCIAL/ SPC ACQUISITIONS, INC.; FINANCIAL COLLECTIONS, INC.,	No. 98-56810 D.C. No. CV-96-01877-MRP
Plaintiffs-Appellees,	MEMORANDUM*
v.	
WALTER JITNER,	
Defendant-Appellant.	

Appeal from the United States District Court
for the Central District of California
Mariana R. Pfaelzer, District Judge, Presiding

Submitted April 17, 2001**
Pasadena, California

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

Before: PREGERSON, FERNANDEZ, and GRABER, Circuit Judges.

Defendant Walter Jitner appeals the district court's entry of summary judgment in favor of Plaintiffs Commercial Financial and Financial Collections. Plaintiffs, who are assignees of the Federal Deposit Insurance Corporation (FDIC), sued Defendant on two promissory notes. We affirm.

1. Defendant first argues that, under Federal Rule of Civil Procedure 56(e), Plaintiffs were required to attach to their affidavits in support of summary judgment all the documents on which they relied. Plaintiffs submitted sufficient documentation to establish their rights to recover on the noted: (a) A copy of the $100,000 note, attached to the McLaughlin affidavit, shows an endorsement to Financial Collections from the FDIC. (b) A copy of the $50,000 note, attached to the Robertson affidavit, shows an endorsement from the FDIC to Commercial Financial. Those documents, in conjunction with Defendant's in-court concession that he owes the money, demonstrate Plaintiffs' rights to enforce the notes.

2. Defendant next contends that California Commercial Code § 3501 requires Plaintiffs to present him with the original notes as a prerequisite to their enforcement. Section 3504 of the California Commercial Code expressly excuses presentment when, "by the terms of the instrument[,] presentment is not necessary to enforce the obligation," § 3504(a)(3), and when "the drawer ... whose obligation is being enforced has waived presentment," § 3503(a)(4). By the terms of both notes, Defendant has waived any right of presentment.

3. Third, Defendant asserts that there is a genuine issue of material fact as to whether the banks performed all their obligations relating to the two notes, that his

repayment of the loans was conditioned on the banks' performance of those obligations, and that his obligation to repay is excused by the banks' failure to perform. Defendant says that two documents that are separate from the notes impose additional obligations on the banks and that it is disputed whether the banks met those obligations: (a) the "Commitment Letter" and (b) the "Business Loan Agreement."

The Commitment Letter agrees to extend the loan for, at most, a year from the original due date of June 3, 1992, at a higher rate of interest than the rate appearing on the face of the note. Because Plaintiffs did not attempt to collect on the note until March 1996, nearly three years after the loan would have come due had it been extended, Defendant, in effect, already received the extension.

With respect to the Business Loan Agreement, Defendant's argument fails because the document places no obligation upon the lender to renew the loan but, instead, states plainly that "the granting, renewing or extending" of any loan is solely within the discretion of the lender.

In sum, neither document provides Defendant with a defense to his obligations to repay the notes.

4. Next, Defendant argues that the district court abused its discretion by denying his several motions to extend discovery. Defendant had seven months for discovery, and the record does not reflect that his need for more time was caused by hardship. Under the circumstances, the district court did not abuse its discretion by denying Defendant's motions for additional discovery.

5. Finally, Defendant argues that the district court abused its discretion when it denied him the opportunity to file an amended answer in response to Plaintiffs' Second Amended Complaint before the court ruled on Plaintiffs'

motion for summary judgment. Because the second amended complaint is almost identical to the initial complaint, the district court did not abuse its discretion.

AFFIRMED.

Filed December 10, 2001

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CF/SPC 1994, INC.; COMMERCIAL FINANCIAL/ SPC ACQUISITIONS, INC.; FINANCIAL COLLECTIONS, INC.	No. 98-56810
Plaintiffs-Appellants,	D.C. No. CV-96-01877-MRP
v.	ORDER
WALTER JITNER,	
Defendant-Appellant.	

Before: PREGERSON, FERNANDEZ, and GRABER, Circuit Judges.

Appellant's late petition for rehearing tendered May 25, 2001, is ordered filed.

Appellant's petition for rehearing is DENIED.

Filed January 2, 2002

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 98-56810
CT/AG#: CV-96-01877-MRP

COMMERCIAL FINANCIAL/
SPC ACQUISITIONS INC.

Plaintiff-Appellee

v.

WALTER JITNER.

Defendant-Appellant

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered May 3, 2001

Filed December 22, 1999

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

COMMERCIAL FINANCIAL/ SPC ACQUISITIONS, INC., and FINANCIAL COLLECTIONS, INC.,

Case No. CV-96-01877-MRP

Plaintiffs,

v

CORRECTED JUDGMENT

WALTER JITNER, an individual, PETER S. FULLERTON, an individual,

Defendants.

The Court has reviewed all papers filed in connection with the Motion by Plaintiffs COMMERCIAL FINANCIAL/SPC ACQUISITIONS, INC. ("COMMERCIAL") and FINANCIAL COLLECTIONS, INC. ('FINANCIAL") for correction of the Judgment filed herein on September 10, 1998, and said motion has been considered and granted. Pursuant thereto, the Court ordered the correction of the Judgment as appropriate based upon the granting of the two motions for summary judgment in favor of the above Plaintiffs.

Therefore, the Court corrects said filed Judgment as follows:

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Judgment is awarded to Plaintiff Commercial Financial/SPC Acquisitions, Inc. and against Defendants

Walter Jitner and Peter Fullerton jointly and severally, in the following amounts:

Principal	$50,000.00
Interest due as of 7/27/98 (plus interest due from 7/28/98 to date, costs, & reasonable attorney fees to be fixed by the Court)	17,450.00

2. Judgment is awarded to Plaintiff Financial Collections, Inc. and against Defendants Walter Jitner and Peter Fullerton jointly and severally, in the following amounts:

Principal	$100,000.00
Interest due as of 7/17/98 (plus, interest due from 7/28/98 to date, costs, & reasonable attorney fees to be fixed by the Court)	34,900.22

3. The clerk is ordered to enter this Corrected Judgment forthwith.

DATED: December 22, 1999 /s/Mariana R. Pfaelzer
Honorable Mariana R. Pfaelzer
United States District Judge

Maine Commercial Code Statute

11 MRSA § 3-1203
(UCC Comment 2)

Maine Uniform Commercial Code 11 MRSA § 3-1203

(1) An instrument is transferred when it is delivered by a person other than it's issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

(2) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee can not acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

(3) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

(4) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under the Article and has only the rights of a partial assignee.

UCC Comment 2

Although the transferee is not a holder, under subsection (b) the transferee obtained the rights of the

transferor as holder. Because the transferee's rights are derivative of the transferor's rights, those rights must be proved. Because the transferee is not a holder, there is no presumption under Section 8-308 that the transferee by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it.

California Commercial Code § 3203 and Official Comment 2 Thereto

Cal Coml Code § 3203

(a) An instrument is transferred when it is delivered by a person other than it's issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee can not acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

(c) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

(d) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under the Article and has only the rights of a partial assignee.

Official Comment 2 thereto

Although the transferee is not a holder, under subsection (b) the transferee obtained the rights of the transferor as holder. Because the transferee's rights are derivative of the transferor's rights, those rights must be proved. Because the transferee is not a holder, there is no presumption under Section 8-308 that the transferee by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it.

O'Melveney & Myers v FDIC
(1994) 512 US 79

Pages 85, 86 and 88 are attached

We turn, then, to the more substantial basis for the decision below, which asserts federal pre-emption not over the law of imputation generally, but only over its application to the FDIC suing as receiver. Respondent begins its defense of this principle by quoting *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715, 726 (1979), to the effect that "federal law governs questions involving the rights of the United States arising under nationwide federal programs." But the FDIC is not the United States, and even if it were we would be begging the question to assume that it was asserting its *own* rights rather than, as receiver, the rights of ADSB. In any event, knowing whether "federal law governs" in the *Kimbell Foods* sense—a sense which includes federal adoption of state-law rules, see *id.*, at 727–729—does not much advance the ball. The issue in the present case is whether the California rule of decision is to be applied to the issue of imputation or displaced, and if it *is* applied it is of only theoretical interest whether the basis for that application is California's own sovereign power or federal adoption of California's disposition. See *Boyle* v. *United Technologies Corp.*, 487 U. S. 500, 507, n. 3 (1988).

In answering the central question of displacement of California law, we of course would not contradict an explicit federal statutory provision. Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law. See *Northwest Airlines, Inc.* v. *Trans-*

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Section 1821(d)(2)(A)(i), which is part of a title captioned "Powers and duties of [the FDIC] as . . . receiver," states that "the [FDIC] shall, . . . by operation of law, succeed to—all rights, titles, powers, and privileges of the insured depository institution . . . ." 12 U. S. C. § 1821(d)(2)(A)(i) (1988 ed., Supp. IV). This language appears to indicate that the FDIC as receiver "steps into the shoes" of the failed S&L, cf. *Coit Independence Joint Venture* v. *FSLIC*, 489 U. S. 561, 585 (1989), obtaining the rights "*of* the insured depository institution" that existed prior to receivership. Thereafter, in litigation by the FDIC asserting the claims *of* the S&L—in this case California tort claims potentially defeasible by a showing that the S&L's officers had knowledge—"'any defense good against the original party is good against the receiver.'" 969 F. 2d, at 751 (quoting *Allen* v. *Ramsay*, 179 Cal. App. 2d 843, 854, 4 Cal. Rptr. 575, 583 (1960)).

Respondent argues that § 1821(d)(2)(A)(i) should be read as a *nonexclusive* grant of rights to the FDIC receiver, which can be supplemented or modified by federal common law; and that FIRREA as a whole, by demonstrating the high federal interest in this area, confirms the courts' authority to promulgate such common law. This argument is demolished by those provisions of FIRREA which specifically create special federal rules of decision regarding claims by, and defenses against, the FDIC as receiver. See 12 U. S. C. § 1821(d)(14) (1988 ed., Supp. IV) (extending statute of limi-

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Boyle, supra, at 508. What is fatal to respondent's position in the present case is that it has identified *no* significant conflict with an identifiable federal policy or interest. There is not even at stake that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity. The rules of decision at issue here do not govern the primary conduct of the United States or any of its agents or contractors, but affect only the FDIC's rights and liabilities, as receiver, with respect to primary conduct on the part of private actors that has already occurred. Uniformity of law might facilitate the FDIC's nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty—but if the avoidance of those ordinary consequences qualified as an identifiable federal interest, we would be awash in "federal common-law" rules. See *United States* v. *Yazell*, 382 U. S. 341, 347, n. 13 (1966).

The closest respondent comes to identifying a specific, concrete federal policy or interest that is compromised by California law is its contention that state rules regarding the imputation of knowledge might "deplet[e] the deposit insurance fund," Brief for Respondent 32. But neither FIRREA nor the prior law sets forth any anticipated level for the fund, so what respondent must mean by "depletion" is simply the forgoing of *any* money which, under any *conceivable* legal rules, might accrue to the fund. That is a broad principle indeed, which would support not just elimination of the defense at issue here, but judicial creation of new, "federal-common-law" causes of action to enrich the fund. Of course we have no authority to do that, because there is no federal policy that the fund should always win. Our cases have previously rejected "more money" arguments remarkably similar to the one made here. See *Kimbell Foods, supra*, at

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FDIC v Houde
(1st Cir 1996) 90 F3d 600

FDIC v Houde (1st Cir 1996)
90 F3d 600

Excerpts from Page 604 and 605.

"The Houdes reply that the FDIC never presented competent proof of the various transactions through which it allegedly acquired lawful ownership and possession of the Note, Golden's testimony having, in their view, been rightly stricken as hearsay. They argue that without such competent evidence, the FDIC's case failed as a matter of law.

The district court dismissed the case because it concluded that the FDIC had failed to meet its burden of presenting sufficient evidence to establish, prima facie, that it was a party entitled to enforce the Note. Without proper proof of ownership, the Note would not be admissible as a basis for the FDIC's claim. The question, of course, would not be whether the FDIC's right to enforce the Note was conclusively established but whether enough of a case was made out to go to the jury. See Fed.R.Civ.P (50(a) ("If... there is no legally sufficient evidentiary basis for a reasonable jury to find for (a) party on (an) issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party.").

1. The FDIC's Burden of Proof

(1) The FDIC argues that possession of the Note was a sufficient basis

for it to be entitled to a presumption that it could enforce the Note. The FDIC points to federal law, set forth in FIRREA, providing expressly that the FDIC succeeds by operation of law to a failed bank's right and title in all of its assets. .....

(2,3) The applicable Maine law, set forth in the Maine Uniform Commercial Code, Negotiable Instruments, 11 M.R.S.A. 3-1101 et seq.,[3] provides that a note qualifying as a negotiable instrument can be enforced by "holder(s)" and "nonholder(s) in possession of the instrument who (have) the rights of holder(s)." See 11 M.R.S.A. § 3-1301.[4] The FDIC is plainly not a "holder" under Maine law because the Note was not indorsed to the FDIC and therefore was not "negotiated".[5] See 11 M.R.S.A. § 3-1201 ("[I]f an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder.");[5] see also Calaska Partners Ltd. v Carson, 672 A.2d 1099, 1104 (Me.11996) (holding that holder in due course status is not conferred when financial instruments are transferred in bulk to the FDIC). (emphasis added)

(4) Not being a holder, the FDIC had to show, as a prerequisite to enforcing the Note against the Houdes, that it was a transferee in possession entitled to the rights of a holder. See 11 M.R.S.A. § 3-1203. Comment 2 following § 3-1203 provides:

If the transferee is not a holder because the transferor did not indorse, the transferee is

nevertheless a person entitled to enforce the instrument ... if the transferor was a holder at the time of transfer.... Because the transferee is not a holder, there is no presumption ... that the transferee, by producing the instrument, is entitled to payment. The instrument, by its terms, is not payable to the transferee and the transferee must account for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it. Proof of a transfer to the transferee by a holder is proof that the transferee by a holder is proof that the transferee has acquired the rights of a holder. At that point the transferee is entitled to the presumption.... (emphasis added).[7] Thus, in order minimally to be entitled to the presumption under Maine law that it could enforce the Note, the FDIC was required (1) to prove a sufficient transfer from a holder (here MNB, to which the note was made payable by the Houdes) to the FDIC in its present capacity as receiver of NMNB, and (2) to produce the Note at trial." (emphasis added)

Excerpt from Page 607

"(8) Attempting to justify the lack of admissible foundation evidence, the FDIC now argues that because the Note was never indorsed and never made payable to anyone other than MNB, it plainly could not have been sold to a third party by the FDIC or the bridge bank. But while the absence of an indorsement on the Note strengthens the argument that no one acquired a title superior to that of the FDIC, it does not by itself meet the FDIC's burden to 'account

for possession of the unindorsed instrument by proving the transaction through which the transferee acquired it.' 11 M.R.S.A. § 3-1203, Comment 2, supra."